No. 2880.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BLUE GOOSE MINING COMPANY, a corporation,

Plaintiff in Error,

vs.

NORTHERN LIGHT MINING COMPANY, a corporation,

Defendant in Error.

PETITION FOR REHEARING

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PETITION FOR REHEARING.

Plaintiff in error respectfully petitions the Court for a rehearing of this cause and in support of its application urges the following:

The decision rendered by this Court is by its express terms predicated upon a *fact not proven in evidence;* a fact as to which all reference was excluded by the trial court, viz.: the fact that, as cited in the opinion, the President of plaintiff in error was the "general executive of the corporation" and that the President had "general executive authority."

If such were the proven fact there could be no question as to the right of the official in question to bind his corporation by appearance in defense of an action brought against it. If success of plaintiff in error were dependent upon controverting this elementary and incontrovertible rule of law this appeal could properly be characterized as frivolous. The legal propositions enunciated by the Court are as incontestably correct as, in our judgment, and we say it with all due respect, the statement of the essential fact upon which the legal conclusions are based is incorrect and without a shadow of support in the record.

This case properly concerns only the question of the power of a President of a corporation *as such* to appear in litigation for his corporation without any delegation of authority whatever from the Board and without any proof of his actual or ostensible relationship to the corporation as "the general executive" or "managing director" or "chief executive" or "executive officer" or "general manager" or other relationship to the corporation other than such as is in law and in fact implied within his status as President. There is not one word in the evidence indicating, directly or indirectly, that the President of plaintiff in error was anything but just plain President. There are no facts whatever to warrant the extension of the legal inquiry beyond the question as to the power of a President of a corporation

to appear in litigation on behalf of his corporation strictly *by virtue of his office as President.*

We most respectfully urge that the decision in this case plainly begs this question, as appears from the following quotations therefrom:

> "Accepting this general rule the inquiry here is at once narrowed to determining whether by virtue of his official relationship to the corporation and under his authority conferred by the By-laws the President could employ counsel to appear in behalf of the Company. Our conclusion is that Lindeberg, as the 'general executive of the corporation' as President had power to employ counsel to defend the corporation unless forbidden to do so."
>
> "But the rule being that the President of a corporation with general executive authority has authority to employ counsel to appear in defense of an action against his corporation, and to manage the defense, omission to confer such authority is immaterial."

The decision quotes the by-law of the corporation to the following effect: "The President shall be the general executive officer of the corporation . . ." It is to be noted in the above quotation from the decision of this Court that the phrase "general executive of the corporation" is by this Court placed in quotation marks. Accordingly the assumption by this Court that the record shows that the President was the general executive of the corporation is apparently based upon the supposed efficacy of the by-law. If so, the Court has overlooked the fact that the by-law

is not in evidence. It was merely offered in evidence and rejected (Tr., 120 *et seq.*), and we take it that an offer to prove a fact to which no oath had been made can hardly be taken as proof of such fact. Nor would there be any force in the argument that as the by-law in question was offered by plaintiff in error it would be assumed against such plaintiff that upon a retrial such alleged by-law could be proven. There is no proof that this is the by-law and therefore no warrant for the conclusion that it could on a retrial be proven. Also it must be assumed that counsel for plaintiff in error in the lower court were entitled to limit the introduction of evidence on behalf of their client in view of the legal sufficiency and effect of the evidence admitted and were not required to submit all possible defenses on the theory that other and additional evidence might on a retrial be introduced. *Non constat* therefore but that such counsel in the lower court might, in case said by-law had been proven, have offered additional and other evidence.

If, on the other hand, it was not the supposed authority of the by-law upon which this Court based the statement that the President was the chief executive officer it must have been either upon some supposed evidence in the record to that effect (which an examination of the transcript will be found to be wholly lacking), or upon the legal proposition that there is implied in the bare office of President of a corporation the powers of a chief executive of the

corporation. If this is the legal conclusion intended to be stated in the Court's decision it is to be noted that there is no discussion thereof and no authorities cited thereon. The pertinency of which is made apparent by the citations and quotations from authorities below to the point that the President of a corporation, merely by virtue of his office, has no more power than any other director. On this the authorities seem to be practically unanimous. A few cases which at first reading do not seem to conform to this rule will, as pointed out by Mr. Thompson in his work on corporations (quoted below), be found to be cases where coupled to proof of his office as President was proof of some fact, as either that he has been designated as Managing Agent or that he has in one way or another acquired actually or ostensibly powers not inherent in his office as President.

The fundamental proposition, as pointed out by Mr. Thompson and supported by the authorities, is that the President, to wit, presiding officer, is the presiding officer of the Board of Directors. It is the Board of which he is President, not the corporation. He is not a representative of the corporation nor in any sense its managing agent nor in charge of its affairs nor entitled to act for or bind it in anyway other than as any other director might do.

The indisputable fact is, for the purposes of this appeal, that the President in this case had the powers inherent in his office, no more, no less. The incon-

trovertible rule of law is that a President of a corporation, by virtue of the powers inherent in his office, has no authority to act for his corporation in the prosecution or defense of litigation, which proposition is clearly enunciated by the authorities quoted at length below. The inevitable conclusion from which is that plaintiff in error is entitled to a rehearing.

On the above stated legal propositions, in addition to supplemental authorities plaintiff in error filed upon the oral argument, we beg to submt the following which are typical of the contolling and practically unanimous line of authorities.

Thompson on Corporations, Sec. 1454.

> "It may be asserted as a general rule that the president, merely by virtue of his office, has no power as such. The fact that he is president gives him no implied power to bind the corporation, beyond that of any other director. The reasons for this are obvious from the functions of his office as already suggested. The directors themselves are the managing agents, and the mere fact that they select one of their number to preside at the meetings of the board, is not sufficient to transfer the power inherent in the directors to any particular person."

Thompson on Corporations, Sec. 1455.

> "In the absence of an express delegation of power, or of acquiescence in his acts, or holding him out to the public, or where he is not entrusted

with the general management of the business, there are many cases holding that he has no implied authority to transact business or make contracts for the corporation. Thus, he has been held to have no implied power to perform the following acts or make the following contracts . . . institute actions on its behalf, or appear for the corporation in a pending action, or employ counsel."

Thompson on Corporations, Sec. 1458.

"It is difficult to reconcile the common business transactions and every-day experience of corporate dealings with the legal proposition that the president of a corporation has no power to transact its business. Yet there is practically no occasion for confusion, if certain underlying principles are kept in mind. It may be asserted here, and will be subsequently shown, that any general manager or superintendent has the power to transact the ordinary business of the corporation; in fact, the corporation by its board of directors may delegate to any person the management of the ordinary ministerial affairs of the corporation. It must be borne in mind also that the so-called president is the president of the board of directors, and not, as shown already, the representative of the corporation, or in any sense its managing agent. On the other hand, by a careful analysis of the cases, it will be seen, that the president has been held to have the power to bind the corporation, from the fact either that he has been designated by the board of directors as the managing agent, or that the directors have held him out as such agent or acquiesced in his act and course of dealing to the extent that they have led the public and persons dealing with him to believe that he was, in fact, the managing agent of the corporate business."

In *Mahone* vs. *Manchester & Lawrence Railroad Corporation,* 111 Mass. Rep., 72-75, it is said:

> "No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties. This doctrine has been applied by the Supreme Court of the United States and by the Court of Appeals of New York to officers of such large and general authority as presidents and cashiers of banks. *Bank of United States* vs. *Dunn,* 6 Pet., 51; *United States* vs. *City Bank of Columbus,* 21 How., 356; *Hoyt* vs. *Thompson,* 1 Seld., 320. And this court has accordingly held that the president of a manufacturing corporation had no authority as such to begin an action in behalf of the corporation, or to bind it by his appearance in court. *Ashuelot Manuf. Co.* vs. *Marsh,* 1 Cush., 507; *Globe Works* vs. *Wright,* 106 Mass., 207, 216. See also *White* vs. *Westport Cotton Manuf. Co.,* 1 Pick., 215; *E. Carver Co.* vs. *Manufacturers' Ins. Co.,* 6 Gray, 214; *Markey* vs. *Mutual Benefit Ins. Co.,* 103 Mass., 78."

In *Pacific Bank* vs. *Stone,* 121 Cal., 202-206, the Court says:

> "Appellant quotes from *Streeten* vs. *Robinson,* 102 Cal., 542, where it is said: 'The authority of the president or other head of a corporation to employ an attorney when the exigencies of his company require it has been repeatedly recognized.' (Citing, also, numerous other cases.) We have examined these cases beginning with *Pixley* vs. *Western Pac. R. R. Co.,* 33 Cal., 183, 91 Am. Dec., 623, and in no one of them is the doctrine laid down that the president of a corporation has by virtue of his office alone the power to bind

the corporation in a transaction like the one we have here. In all the cases, as was true in the case in 102 California, *supra,* the president or other head of the corporation was shown to have been the general business manager, or he had admitted relations to the corporation from which authority might be inferred; or there was specific knowledge and acquiescence brought home to the directors; or there was a general custom or usage proven that the president or other manager had exercised like powers with the consent and acquiescence of the directors."

In *Black* vs. *Harrison Home Co.,* 155 Cal., 121-126, it is said:

"It is an elementary principle of corporation law that the president of a corporation has no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 *Cook on Corporations,* section 716, as follows: 'The President of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds or management. This is a rule which prevails everywhere, excepting possibly in the State of Illinois. It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may

ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director. (See *Alta Silver Min. Co.* vs. *Alta Placer Min. Co.*, 78 Cal., 629, 632 (21 Pac., 373); *Bliss* vs. *Kaweah etc. Co.*, 65 Cal., 502 (4 Pac., 507); *Salfield* vs. *Sutter etc. Co.*, 94 Cal., 546 (29 Pac., 1105); *Blood* vs. *La Serena etc. Co.*, 113 Cal., 221 (41 Pac., 1017; 45 Pac., 252); *Barney* vs. *Pfoor*, 117 Cal., 56, 58 (48 Pac., 987); *Northwestern etc. Co.* vs. *Whitney*, 5 Cal. App., 105, 108 (89 Pac., 981).)"

In *Rockefeller* vs. *Lamora*, 89 N. Y. Sup., 1-4, it is said:

"The office of president does not in itself confer power to bind a corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation or in a delegation of authority from it, directly or through its board of directors, formally expressed, or implied from a habit or custom of doing business. 10 *Cyclopedia of Law & Procedure*, 903."

In *Titus & Scudder* vs. *Cairo and Fulton R. R. Co.*, 37 N. J. Law Rep., 98-102, it is said:

"In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station, no more control over the corporate property and funds, than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived.

"The act of a president or other officer, unless

it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it.

"If any authority is necessary upon a rule of law so well settled, it may be found by reference to *Angell & Ames on Corporations,* Secs. 297, 298 and 299."

In *Lyndon Mill Company* vs. *Linden Literary and Biblical Institution,* 25 Am. St. Rep., 783-784, it is said:

"A single trustee or director has no power to act for the institution which creates his office, except in conjunction with others. It is the board of trustees or directors only that can act. If the board of trustees or directors makes a president, trustee, or any other person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him, as the board itself. His authority is, in such case, the authority of the board."

Respectfully submitted.

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